No. 105

IN THE

Supreme Court of the United States

October Term, 1947

JACOB LICHTER and JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

PAUL W. STEER,
STEER, STRAUSS & ADAIR,
2215 Union Central Building,
Cincinnati 2, Ohio,
Attorneys for Appellants.

Of Counsel:
STEER, STRAUSS & ADAIR,
2215 Union Central Building,
Cincinnati 2, Ohio.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

INDEX

	PAGE
Proceedings Here Thus Far	1
Proceedings Below	2
Statement of the Case	2
Specifications of Error	5
Questions Presented and Contentions of Appellants	5
Summary of Argument	7
Argument	9
I Under the Original Renegotiation Act, Any Controversy Thereunder Could Be Determined in the Several District Courts; the Revenue Act of 1943 First Inserted the Tax Court Provisions; for 1942 Business the Tax Court Provisions of the 1943 Act Are Supplemental and Not in Abrogation of the Pre-Existing Remedies in the District Courts The District Court Therefore Had Jurisdiction of the Within Controversy and Appellants Were Entitled to Raise and Be Heard On All Defenses	9
II (Question Presented No. II) The District Court Having Jurisdiction, It and the Circuit Court of Appeals Should Hold That Appellants' Contracts Are Exempt as Competitive Subcontracts under a Contract With a Department of the Government, Awarded as a Result of Competitive Bidding for the Construction of Buildings and Facilities	17
III (Question Presented No. III) With Respect to Appellants' Subcontracts and the Determination That Excessive Profits Were Derived Therefrom, the Renegotiation Act Is Unconstitutional for the Following Reasons:	25

PAGE

(1) The Renegotiation Act Violates Standards Required of Legislation under the Constitution of the United States, for the Reason That It Is Indefinite and Uncertain in That There Is No Legal Definition of the Term "Excessive Profits" 25

(2) The Legislative Function Residing in the Congress of the United States Is Improperly Delegated in the Renegotiation Act 31

(3) The Determination That Appellants Realized Excessive Profits and the Judgment Based Thereon Constitutes a Taking of Appellants' Property Without Due Process of Law and a Taking of Appellants' Property for Public Use Without Compensation 40

Ad Hominem 48

TABLE OF CASES

Aircraft and Diesel Equipment Corp. v. Hirsch, 67 Sup. Ct. 1493 5

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 202 38

Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123 42

Case v. Bowles, 327 U. S. 92, 99 16

Ex Parte Milligan, 4 Wall. 2, 120 46

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 425 46

Lynch v. United States, 292 U. S. 571, 579 42

Macauley v. Waterman S. S. Corporation, 327 U. S. 540 5, 15, 16, 17

Monongahela Navigation Co. v. United States, 148 U. S. 312, 327 43

Morgan v. United States, 298 U. S. 468 and 304 U. S. 1, 14, 15 29, 38

PAGE

National City Bank v. United States, 275 Fed. 855, 859 (affirmed 281 Fed. 754; error dismissed 263 U. S. 726) 44

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292 ..... 29, 38, 39

Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 31, 32, 33

Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. (2d) 554, 559 39

Schechter Poultry Co. v. United States, 295 U. S. 495, ... 31, 45

Seaboard Airline R. Co. v. United States, 261 U. S. 299, 304 44

Shields v. Utah Idaho Central R. Co., 305 U. S. 177, 182 38

Small Co. v. American Sugar Co., 267 U. S. 233 31

United States v. L. Cohen Grocery Co., 255 U. S. 81 ..... 31, 45

United States v. New River Collieries, 262 U. S. 341, 343 44

Weeds v. United States, 255 U. S. 109 31

Yakus v. United States, 321 U. S. 414, 430 ..... 16, 31

SECONDARY AUTHORITIES

Congressional Record 9, 33, 34, 35, 36, 37

Conference Report 1079 in House of Representatives, 78th Congress, 1st Sess. 20, 22, 24, 25

Hearings Before House Ways and Means Comm., 78th Congress, 1st Sess. 41

House Report Numbered 871, 78th Congress, 1st Sess., ... 20, 21

Legislative Materials (Barron K. Grier, Clerk), ... 33, 34, 35, 36, 37

PAGE

Revenue Act of 1943 Hearings, Comm. on Finance, 78th Congress, 1st Sess. 23

Senate Report Numbered 627, 78th Congress, 1st Sess., 20, 21

STATUTES

Military Appropriation Act, 1944, Act of July 1, 1943 (Public Law 108, 78th Congress, 2nd Sess., 57 Stat. 347); Act of July 14, 1943 (Public Law 149, 78th Congress, 1st Sess., 57 Stat. 564) 2

Revenue Act of 1942 (Act of October 21, 1942, Public Law 753, 77th Congress, 2nd Sess., 56 Stat. 798, 982) 2, 27, 33, 38

Revenue Act of 1943 (Act of February 25, 1944, Public Law 235, 78th Congress, 2nd Sess., 58 Stat. 21, 78th Congress, 1st Sess., 57 Stat. 564) 2, 26, 27, 28, 30, 31, 33, 38, 44

Sixth Supplemental National Defense Appropriation Act, 1942 (Act of April 28, 1942, Public Law 528, 77th Congress, 2nd Sess., 56 Stat. 226, 245), 2, 9, 13, 18, 25, 27, 33, 38, 39, 41

No. 105

IN THE

Supreme Court of the United States

October Term, 1947

JACOB LICHTER and JENNIE L. LICHTER, individually and as co-partners doing business as SOUTHERN FIREPROOFING COMPANY, a co-partnership

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

PROCEEDINGS HERE THUS FAR

On May 27, 1947, Appellants filed their Petition for a Writ of Certiorari by virtue of jurisdiction conferred on this Court to review the controversy under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

On June 16, 1947, Appellants' Petition for a Writ of Certiorari was granted and the case transferred to the Summary Docket. Following this, on June 23, 1947, the following order was entered:

"This cause is removed from the summary docket and is assigned for argument immediately preceding the hearing of Nos. 1295 and 1391 (*Pownall et al.* v. *United States* and *Alexander Wool Combing Co.* v. *United States.*"

PROCEEDINGS BELOW

The case came on for hearing in the District Court for Southern District of Ohio, Western Division, on the Government's Motion for Judgment on the Pleadings and for Summary Judgment (R. p. 23), and on Appellants' Motion to Dismiss (R. p. 25).

The District Court filed no opinion, but entered a Findings of Fact and Conclusions of Law (R. p. 26), upon which judgment was entered (R. p. 31) against Appellants in favor of the United States for $27,019.39.

The Circuit Court of Appeals affirmed the District Court on March 10, 1947.

The Circuit Court of Appeals rendered and filed an opinion (R. p. 40) which is officially reported in 160 Fed. (2d) 329.

STATEMENT OF THE CASE

(1) This case presents questions relating to and involving the Renegotiation Act, which is contained in the following:

Sixth Supplemental National Defense Appropriation Act, 1942 (Act of April 28, 1942, Public Law 528, 77th Cong., 2nd Sess. 56 Stat. 226, 245);

Revenue Act of 1942 (Act of October 21, 1942, Public Law 753, 77th Cong., 2nd Sess. 56 Stat. 798, 982);

Military Appropriation Act, 1944, Act of July 1, 1943 (Public Law 108, 78th Cong., 2nd Sess., 57 Stat. 347); Act of July 14, 1943 (Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564);

Revenue Act of 1943 (Act of February 25, 1944, Public Law 235, 78th Cong. 2nd Sess., 58 Stat. 21, 78).

(2) On October 20, 1944, Robert P. Patterson, then Under Secretary of War, issued a unilateral order determining that Appellants had realized excessive profits of $70,000.00 during the calendar year 1942, and directed Appellants to pay said amount to the Treasurer of the United States, less a tax credit of $42,980.61, or the sum of $27,019.39. Appellants made no payment in response to this determination.

Two of the foregoing facts, for reasons stated in Argument, are of cogent importance to Appellants' case: (a) that it was the *Secretary* of War who issued the order determining excessive profits to exist and not the *War Contracts Price Adjustment Board*, despite the fact that the order was issued some eight months after the effective date of the Act. The Board was set up for the first time in section 403(d) (1) of the Revenue Act of 1943 (Act of February 25, 1944); and (b) that the order relates solely to 1942 business done by Appellants.

(3) Appellants did not file a petition in the Tax Court of the United States for a redetermination of the Under Secretary's order, and the time for filing such petition has expired.

It is the contention of Appellants that a person aggrieved by a determination of excessive profits, *with respect to 1942 business*, need not seek relief from the order in the Tax Court; and that, as to such 1942 business, the Renegotiation Acts direct that the District Court is a forum in which the person aggrieved may have a complete hearing on all matters involved and relating to the determination.

(4) Thereafter this action was brought by the United States to recover the alleged excessive profits in the amount of the determination, that is, $27,019.39.

(5) The business of Appellants is the construction of brick masonry, customarily by subcontracts, and is of a

type which is generally similar to brick masonry as it has been known in the construction industry for many years (R. p. 26).

(6) All contracts involved are subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding, for the construction of buildings and facilities (R. pp. 4, 26), and were obtained by Appellants after further competitive bidding (R. p. 26).

This is of decisive pertinence in view of the exemption provisions of the 1943-44 Act, Section 403(i) (1) (E) and (F), in the light of the "Effective Date" provisions of this latter Act, Section 701(d). These two sections of the 1943-44 Act read as follows:

> "Section 403 (i) (1). The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or
>
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "Section 701(d)—Effective Date
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), *(i) (1) (F)*, (i) (3), and (1), in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment*, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

(7) The District Court rendered judgment against Appellants for $27,019.39, the amount of the determination.

SPECIFICATIONS OF ERROR

(1) The District Court of the United States for the Southern District of Ohio, Western Division, erred in granting judgment against Appellants.

(2) The Circuit Court of Appeals for the Sixth Circuit erred in affirming the judgment of the District Court.

The assigned reasons for the foregoing are set forth in the following "Questions Presented and Contentions of Appellants."

QUESTIONS PRESENTED AND CONTENTIONS OF APPELLANTS

I.

Does the District Court have jurisdiction to determine Appellants' rights pertaining to the determination of the Secretary of War that Appellants derived excessive profits for business done in the 1942 calendar year?

Both courts below answered this question "No," for the assigned reason that a person aggrieved by a determination of excessive profits made after the effective date of the Revenue Act of 1943, *even with respect to 1942 business*, must seek relief only in the Tax Court of the United States (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. p. 44).

Appellants contend that the Revenue Act of 1943 specifically reserved to Appellants, *with respect to 1942 business*, a privilege to have all rights, claims and matters in connection with alleged excessive profits determined in the District Court.

Adjudications of this Honorable Court (*Macauley v. Waterman SS. Corporation*, 327 U. S. 540; *Aircraft and Diesel Equipment Corp. v. Hirsch*, 67 Sup. Ct. 1493) are not in conflict with this contention.

II.

If it be assumed that the District Court has jurisdiction to determine whether Appellants' contracts are subject to renegotiation, does the Renegotiation Act exempt Appellants' subcontracts?

The trial court found all facts necessary to sustain the claim that Appellants' subcontracts are exempt from renegotiation as subcontracts under prime contracts with a department of the Government, awarded as a result of competitive bidding (R. p. 26), but nevertheless it held that the Tax Court of the United States alone had jurisdiction, without regard to the foregoing uncontradicted facts which, under the Renegotiation Act, specifically exempt such business from renegotiation (District Court Conclusions of Law Nos. 4, 5 and 5, R. pp. 29-30; Circuit Court Opinion, R. pp. 43-44).

Appellants contend that the trial court has jurisdiction, for the reason set forth in I above, and that the Renegotiation Act specifically exempts Appellants' subcontracts as subcontracts under prime contracts with a department of the Government, awarded as the result of competitive bidding, for the construction of buildings and facilities, by virtue of Section 403(i) (1) (E) and (F) and Section 701(d) of the Act.

III.

With respect to Appellants' subcontracts and the determination that excessive profits were derived therefrom, is the Renegotiation Act, so applied, unconstitutional?

The courts below answered this question "No," for the following reasons:

That the Renegotiation Act is a proper exercise of the war powers of Congress; that the Act does not involve an unlawful delegation of legislative power to executive of-

cials nor an exercise of judicial powers by such officials; that the Act does not involve an exercise of eminent domain; that Appellants' property has not been taken for public use in violation of the constitution; that the Act is not so vague and uncertain as to offend the constitution; and that Appellants are not and were not deprived of due process of law (District Court Conclusions of Law No. 2, R. p. 28; Circuit Court Opinion, R. pp. 44-46).

Appellants contend that the Renegotiation Act is unconstitutional for the following reasons:

(1) That the Renegotiation Act violates standards required of legislation under the Constitution of the United States, for the reason that it is indefinite and uncertain in that there is no legal definition of the term "excessive profits."

(2) That the legislative function residing in the Congress of the United States is improperly delegated.

(3) That the determination constitutes a taking of Appellants' property without due process of law, contrary to the Constitution of the United States.

(4) That the determination constitutes a taking of Appellants' property for public use without compensation.

The foregoing "Questions Presented and Contentions of Appellants" will be followed seriatim in Argument.

SUMMARY OF ARGUMENT

I.

(Question Presented No. I This Brief Page 5)

Under the Original Renegotiation Act, Any Controversy Thereunder Could Be Determined in the Several District Courts; the Tax Court Provisions Were First Inserted in the Revenue Act of 1943; for 1942 Business the Tax Court Provisions of the 1943 Act Are Supplemental and Not in Abrogation of the Previously Existing Remedies in the District Courts.

The District Court Therefore Had Jurisdiction of the within Controversy, and Appellants Were Entitled to Raise and Be Heard on All Defenses.

II.

(Question Presented No. II This Brief Page 6)

The District Court Having Jurisdiction, It and the Circuit Court of Appeals Should Have Held That Appellants' Contracts Are Exempt as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding, for the Construction of Buildings and Facilities.

III.

(Question Presented No. III This Brief Page 6)

With Respect to Appellants' Subcontracts and the Determination That Excessive Profits Were Derived Therefrom, the Renegotiation Act Is Unconstitutional for the Following Reasons:

(1) The Renegotiation Act Violates Standards Required of Legislation under the Constitution of the United States, for the Reason That It Is Indefinite and Uncertain in That There Is No Legal Definition of the Term "Excessive Profits."

(2) The Legislative Function Residing in the Congress of the United States Is Improperly Delegated in the Renegotiation Act.

(3) The Determination That Appellants Realized Excessive Profits and the Judgment Based Thereon Constitutes a Taking of Appellants' Property without Due Process of Law and a Taking of Appellants' Property for Public Use without Compensation.

ARGUMENT

I.

Under the Original Renegotiation Act, Any Controversy Thereunder Could Be Determined in the Several District Courts; the Tax Court Provisions Were First Inserted in the Revenue Act of 1943; for 1942 Business the Tax Court Provisions of the 1943 Act Are Supplemental, and Are Not in Abrogation of the Previously Existing Remedies in the District Courts.

The District Court, Therefore, Had Jurisdiction of the within Controversy and Appellants Were Entitled to Raise and Be Heard on All Defenses.

It will not be controverted that prior to the Revenue Act of 1943 (the Act of February 25, 1944), the rights of any person involved in renegotiation procedures was the same as in reference to other statutes; that any controversy thereunder could be determined, in the time-honored way, in a *judicial* proceeding. The original draft of the Sixth Supplemental National Defense Appropriation Act of 1942 (Act of April 28, 1942) contained a flagrantly improper provision that no suit or action could be maintained in any court to recover from the United States any amount withheld from the contractor pursuant to the administrative renegotiation. This resulted in the opposition such a suggestion well deserved, and when the bill finally emerged, the provision against relief in the courts was stricken; the discussions on the Senate floor are significant of the reasons. *Indicative only* of the multiple references of the foregoing is the statement of Senator McKellar, when questioned on this point. His reply is as follows (88 Cong. Rec. 3765):

> ". . . It will be remembered that when the amendment was originally before the Senate, the distinguished Senator from Connecticut, Mr. Danaher, called attention to the fact that *the bill contained a provision which would prohibit a contractor from going into the*

> *courts.* As a result of the amendment of the Senator from Connecticut, *that provision was stricken out.* When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and *if the contractor did not like the decision of the Secretary, he could go into Court and endeavor to have it overruled.*" (Emphasis ours.)
> ". . ."

Accordingly, until the Revenue Act of 1943 (Act of February 25, 1944), a person aggrieved by any order of the Secretary had the right to have the validity and the propriety of any action of the Secretary decided in the courts in the time-honored constitutional fashion.

Then, as has been stated, the Revenue Act of 1943 (sometimes referred to as the Second Renegotiation Act) was passed (Act of February 25, 1944), and the provision for a petition to the Tax Court of the United States was inserted. *However, in reference to fiscal years prior to July 1, 1943 (that is, for 1942 business) that act clearly provided that the Tax Court proceedings are optional only, and the remedy Appellants theretofore had, to have their rights adjudicated in the District Court, had not been taken away.*

The foregoing is demonstrated by a comparison and analysis of Section 403 (e) (2) and Section 403 (c) (1) in the light of the "Effective Date" provision of the Second Act, Sec. 701(d) and Section 403(c) (6) also of the Second Act. Section 403(e) (2) provides as follows:

> "(2) *Any* contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) aggrieved by a determination of the *Secretary* made prior to the date of the enactment of the Revenue Act of 1943, with respect *to a fiscal year ending before July 1, 1943,* as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may,* within ninety days (not counting

Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the *Secretary* made on or after the date of the enactment of the Revenue Act of 1943, with respect to any *such fiscal year* [a fiscal year ending before July 1, 1943] as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, *may*, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1) *except that* the amendments made to this section by the Revenue Act of 1943 *which are not made applicable as of April 28, 1942,* or to fiscal years ending before July 1, 1943, shall not apply."

It is clear that this Section 403(e) (2) was not made applicable to April 28, 1942. The "Effective Date" provision, Section 701(d) provides as follows:

"Section 701(d)—Effective Date

The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and *(e) (2)* to Section 403 of such Act shall be effective from the *date of the enactment of this Act.*" (Emphasis ours.)

In contrast to the *permissive* language of Section 403(e) (2), not made retroactive to April 28, 1942, as shown above, is the mandatory language of Section 403(c) (1). Section 403 (c) (1) is as follows:

> ". . . If the *Board* does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. *In the absence of the filing of a petition* with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), *such order shall be final and conclusive* and shall not be subject to review or redetermination by any court or other agency. . . ."

Then, as if to make it abundantly clear that the "in the absence of" language applied only to business *subsequent to 1942,* in Section 403(c) (6), the application of Subsection (c) is limited to fiscal years ending *after* June 30, 1943. The following is this provision:

> "This subsection shall be applicable to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending *after* June 30, 1943. . . ."

There is one other striking and pertinent difference and distinction between Section 403(c) (1) and Section 403(e) (2). Section 403(c) (1) relates and applies solely to orders of the War Contract Price Adjustment Board, termed therein as "the Board." On the other hand Section 403(e) (2) applies and relates solely to an order or determination of the *Secretary.* Accordingly, the design is clear that, for orders of the *Board,* the Tax Court procedures were mandatory; but for orders or determinations of the *Secretary,* the Tax Court procedures were optional because the orders

and determinations of the Secretary were to proceed upon the basis of the rights secured in the courts under the First Act.

The "order" in this cause is not a *Board* order. It is an order or determination of the *Secretary* under the First Act, i.e., The Sixth Supplemental National Defense Appropriation Act of April 28, 1942 (R. p. 5). The order, set forth in the Bill of Complaint, reads:

> "Now, Therefore, pursuant to the authority vested in the Secretary of War . . . and duly delegated to the Under Secretary of War *under Subsection (f) thereof*, it is hereby found and determined. . . ."

Thus it is the *Secretary's* determination that "aggrieves" Appellants and accordingly, Section 403(e) (2) *only* is applicable. Section 403(c) (1) can have no application as it relates solely to an order of the *Board*.

Appellants urge that it is almost indisputably clear, that the language "*in the absence of the filing of a petition with The Tax Court such order shall be final and conclusive,*" applies only to an order of the *Board* relating to renegotiable contracts for fiscal years ending *after* June 30, 1943. We are here dealing with an order of the *Secretary*, relating to contracts *in the fiscal year ending December 31, 1942*, that is, 1942 business, or, in the language of the Act, a *fiscal* year ending *prior* to July 1, 1943. Thus, the language for 1942 business is permissive, *in contrast* and opposition to the mandatory language of the portion of the Act dealing with orders of the *Board* relating to fiscal years commencing after July 1, 1943.

Therefore, by the plain terms of the statute, although Appellants might have proceeded in The Tax Court upon being aggrieved by the Secretary's determination, they were not required to do so; nor were Appellants subject to the language of Section 403(c) (1) which states that "in

the absence of the filing" etc., the decision of the *Board* will be final. In other words, a clear delineation is made between fiscal years ending *after* July 1, 1943, and fiscal years ending *prior* to July 1, 1943; the Congress left contracts and contractors, with respect to 1942 business, in the same position as they had been prior to the Revenue Act of 1943, to wit: with a right of access to the courts.

The error in the Circuit Court of Appeals' reasoning (R. p. 43) in considering this contention is patent. It comments that it is not unusual for the term "may" to be used, presenting to the citizen the option of either taking a further step in the litigious course, or submitting to the administrator's determination. The error is this: in the ordinary statutory setup, the option or the alternative to the citizen is that, as the court says, of seeking further review, or of submitting. The point here is—entirely missed by the Circuit Court of Appeals—that by virtue of the contrast between the permissive and the mandatory language of the two situations, the usual or ordinary alternative is not presented. Here, it is an alternative of seeking review *either* in the Tax Court or in the District Court, *on the one hand*, or submitting, *on the other hand*.

Moreover, we submit, it is not incongruous, as the Circuit Court of Appeals suggests (R. p. 43), that 1942 business should have this option, when 1943 et seq. business should not have it. The answer to this is clear under the Second Act. Congress specifically stated that it did not desire to take away from 1942 business what rights it already had.

In conclusion, the jurisprudential policy of deciding jurisdictional questions should be examined. It is clear that Appellants have a clear right to relief and exemption from renegotiation for 1942 business (Questions Presented No. II this Brief, pp. 17 to 25). To conclude that a citizen should be denied the right to set up and prove such right, on jurisdictional grounds alone, is a conclusion to which

a court should come with great reluctance; to approach a jurisdictional question otherwise would make the courts a tryst for lawyers and not a forum for the achievement of justice for the aggrieved citizen. We submit that the Revenue Act of 1943 specifically reserves to Appellants the right to have determinations under renegotiation heard and adjudicated in the time-honored fashion, in the District Court. It could be argued that the language of the Act is ambiguous in that it does not state, in so many words, that the previously existing right to have matters concerning 1942 business determined in the Courts, still exists. The question then must be asked—should this Court not give the benefit of the doubt to Appellants, and permit all pertinent questions to be raised in the forum *chosen by the Government?* To deny Appellants' right to set up defenses on ambiguous jurisdictional grounds, would be, we submit, doing an injustice not only to Appellants, but to the administration of justice.

We are then brought to the consideration of *Macauley* v. *Waterman S.S. Corporation*, 327 U. S. 540, erroneously relied on by the Government and by the Circuit Court of Appeals.

If Appellants' analysis of the First and Second Acts (hereinabove) is correct the *Macauley* case is not in any way controlling or dispositive here.

First: If, for 1942 business, there is no requirement to proceed in the Tax Court, the principle of the *Macauley* case, that prescribed administrative procedure must be exhausted, has no relevance. We submit that Appellants' analysis showing that there was no prescribed administrative procedure is correct and therefore the *Macauley* case may be put aside.

Second: The determination in the *Macauley* case was by the War Contracts Price Adjustment Board and not by the *Secretary* as in the instant case. Thus, if Appellants' analy-

sis of the First and Second Acts is correct, and we submit that it is, here again the *Macauley* case is of no relevance, because, as pointed out above (page 12 hereof), upon a determination of the *Secretary*, the right of access to the courts was still had—section 403(e) (2)—as it may not be had for a determination of the *Board* under Section 403(c) (1) and Section 403(e) (1).

Third: The issue is not merely "coverage" as it was in the *Macauley* case. The Government does not contend that the courts may not determine the constitutionality of the legislation, as indeed it could not.

Case v. *Bowles*, 327 U. S. 92, 99;
Yakus v. *United States*, 321 U. S. 414, 430.

Admittedly, then, the Tax Court remedy, purportedly "exclusive," is not exclusive for all matters involved. The question then is, what questions other than Constitutionality may be inquired into?

The Constitutionality may be inquired into because, under the framework of the Renegotiation Acts, as in the *Case* and *Yakus* cases, there is no limitation placed upon the citizen's right to object to unconstitutional legislation when called into court under the legislation. Certainly then, the Court here can inquire into the legislation to see if Appellants have obeyed it, especially since the Acts themselves, as has been pointed out above, specifically state that Appellants may take the course they have taken. In brief, it is the Government's contention that the court may look at the constitutionality but may not look further to ascertain whether Appellants have obeyed the mandate of the statute. The Court, the Government contends, may read the statute for a constitutional determination, but must close its eyes to everything else, even if it be assumed that the statute specifically directed Appellants to follow the

course they have followed, which Appellants contend they have done.

If we have correctly analyzed the statute (pages 7 to 15 hereof), it specifically says that Appellants have the right to go to a court for 1942 business. Should they be compelled to go to the administrative level to have it decide that the statute says they didn't have to go to the administrative level, but instead, had the option of going to a court? If the statute says that Appellants may go to a court, why may they not go and do as the statute directs and why may not the Court say so? It is not a question of coverage, exemption, or exclusive jurisdiction of the Tax Court. The question is whether Appellants have followed a statutory direction as to procedure. We submit that the Court may look at the statute to see if they have, and if they have, to so find. We submit further that Appellants have precisely conformed to the statute, and if the Court had not been erroneously restrained by *Macauley* v. *Waterman S.S. Corporation*, it would have so found. In any event, this question was not decided in the *Macauley* case and it is not a bar to the Court reviewing Appellants' contentions.

II.

The District Court Having Jurisdiction, It and the Circuit Court of Appeals Should Have Held That Appellants' Contracts Are Exempt as Competitive Subcontracts under a Contract with a Department of the Government, Awarded as a Result of Competitive Bidding, for the Construction of Buildings and Facilities.

The trial court found every fact necessary to sustain a ruling that Appellants' contracts are exempt from renegotiation, and yet, it said, it could not adjudicate the issue completely, because it could not look further to determine whether the statute and the exemptions were in effect on April 28, 1942.

The Court found (R. p. 26) that the prime contracts involved were contracts with a Department of the Government, awarded as a result of competitive bidding, for the construction of buildings and facilities, and that Appellants' subcontracts were likewise the result of further competitive bidding. Actually the contracts herein were doubly competitive since they were entered into after competitive bidding on the part of the prime contractors and further competitive bidding on the part of defendants and other masonry contractors. This is admitted by virtue of the Government's Motions, and the trial court so found (Findings of Fact, R. p. 26). Under Section 403(i) (1) (E) and (F), therefore, Appellants' subcontracts were exempt from renegotiation. Then the Court said: that is as far as we can go. We cannot look at the Act to see whether the exemption was available on April 28, 1942. The Tax Court will have to do this.

Appellants contend, for the reasons set forth in "I" hereof, under Argument (pages 7 to 17), that the trial court could have and should have adjudicated the issue of this specific exemption, and accordingly we proceed to point out the reasons why Appellants are entitled to be relieved of the Secretary's determination, keeping in mind that all facts, except the relation and application of the date of the exemption, have been found in Appellants' favor.

The original Renegotiation Act (April 28, 1942) purported to blunderbus all contracts involving more in principal amount than $100,000.00. Later, on the first amendment to the Act, October 21, 1942, certain contracts and subcontracts were made exempt, and the Secretary was given permission to exempt certain others *as of and related back to April 28, 1942.* Then, in the Revenue Act of 1943, passed February 25, 1944, competitive construction contracts and subcontracts with the Department *were made exempt, and here again, as to subcontracts, the exemption*

related back as if it "had been a part of Section 403 on the date of its enactment" on April 28, 1942 (Section 701(d)).

The 1943-44 Act provides as follows:

> "Section 403(i) (1). The provision of this section shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement or facility; or
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."
>
> "Section 701(d)—Effective Date
>
> The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

The foregoing provide that subcontracts under prime contracts with a Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities, are exempt from all provisions of the Renegotiation Act, retroactive to April 28, 1942.

In the mention of the matter in the Court below by Government's counsel, it is indicated that because Section 403 (i) (1) (E) relates back only to July 1, 1943, then Section 403(i) (1) (F) is related back only to that date. This contention is maintained by the Government despite the clear and succinct language of the "effective date" provision, Section 701(d), which provides that Section 403(i) (1) (F)

"shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment" (April 28, 1942). Congress here clearly desired subcontracts to be exempt, back to April 28, 1942, and prime contracts to be exempt only from July 1, 1943. This is indisputably shown by the Senate Report on the Revenue Bill of 1943 (Report No. 627; 78th Cong., 1st Sess.); the House Report (Report No. 871; 78th Cong., 1st Sess.); and the Conference Report in the House of Representatives (Report No. 1079; 78th Cong., 1st Sess.). The Senate Report (Report No. 627) states as follows (page 100):

> "3. *SUBCONTRACTS* UNDER EXEMPT CONTRACTS *OR SUBCONTRACTS* [Subsec. (r) (1) (I) of the Finance Committee Bill; (i) (1) (E) of the House Bill].
>
> "Under existing law, considerable confusion results from the fact that a *subcontract* may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The House Bill exempted such contracts as were directly or indirectly under an exempt contract or subcontract.*
>
> "The exemption in the House Bill went to contracts and subcontracts exempted from the provisions of the renegotiation section and to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the committee bill, the exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.
>
> "*There is an important difference between the House and the committee bill in this respect, further, in that the committee bill makes the exemption retroactive to April 28, 1942.* The House exemption applied only to amounts received or accrued under such contracts or subcontracts in fiscal years of the contractor or subcontractor ending after June 30, 1943." (Emphasis ours.)

It is important to note that the foregoing relates to or deals with subcontracts only. Observe the heading itself; "*Subcontracts* Under Exempt Contracts *or Subcontracts.*" The prime contract exemption is taken up separately at another place in the Report (Report No. 627, p. 103). The difference between the House and the Senate bills are shown positively to be: (a) the House bill proposes to exempt only subcontracts under exempt prime contracts and subcontracts, but related both back to April 28, 1942. The House Report (Report No. 871) states this, as follows (page 79):

> "3. SUBCONTRACTS UNDER EXEMPT PRIME CONTRACTS OR SUBCONTRACTS.
>
> "Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The bill exempts such subcontracts as are directly or indirectly under an exempt contract or subcontract.*" (Emphasis ours.)

Thus, the House bill proposed to exempt only subcontracts under prime contracts which were exempt. The House bill further made both prime contracts and subcontracts exempt from July 1, 1943. The Senate bill treated the two separately and related the subcontracts back to April 28, 1942.

The fact that separate treatment was given to subcontracts on the one hand and prime contracts on the other, is a flat denial that Section 403(i) (1) (F) may only apply if the prime contract was itself exempt as of April 28, 1942. To make the exemption of the prime contract a condition precedent to the exemption of a subcontract is impossible once the two are treated separately.

The only inquiry remaining is to ascertain how the difference in the two bills was resolved. A summary of House and Senate actions follows:

The Conference Report of the House (Report No. 1079, page 36) first took up the competitive construction contract general exemption which had not been contained in the House bill at all; the House agreed to the Senate amendment, thus agreeing that the present Section 403(i) (1) (E) should be in the final bill. This Conference Report in this respect is as follows:

> "*Amendment Numbered 295:* That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: on page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."

This put the general competitive contract in the bill. Amendment No. 296 renumbered the subcontract exemption [403(i) (1) (F)] and inserted it in the final bill. Then came Amendment Numbered 297. What was accomplished by Amendment Numbered 297 is explained in the "Statement of the Managers [of the Conference] on the Part of the House" (Report No. 1079, p. 85), as follows:

> "*Amendment Numbered 297:* Under the provisions of subsection (i) (1) (G) of the Renegotiation Act, as amended by the House bill, any subcontract directly or indirectly under a contract or subcontract exempted from the provisions of the act, or to which the act does not apply by reason of subsection (i) (1) thereof, is exempt; this amendment limits the exemption of such subcontracts under subsection (i) (1) (G) to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1). *The House recedes.*"

Thus, the House bill's proposal that only subcontracts under exempt contracts be exempt was receded from, and the Senate's separate treatment of subcontracts adopted.

Finally, Amendment Numbered 309 of the Conference Report shows that the House receded and agreed to the Senate's proposals, namely, that the exemption of competitive subcontracts only under section (i) (1) (F) relates back to April 28, 1942, even though the prime contracts therefor under Section (i) (1) (E) are exempt from July 1, 1943. In the "Statement of the Managers (of the Conference) on the Part of the House" (Report No. 1079), this is clear. On page 88 the effective date provision is discussed. The Managers state:

> "*Amendment Numbered 309:* This amendment relates to the effective dates of various provisions. *The House recedes* with amendments."

Hence the House agreed to relate the exemption for competitive subcontracts for the construction of a building or facility back to April 28, 1942, as contained in the Senate proposal.

It may be presumed that one of the compelling reasons for the House recession on the separate consideration for subcontracts was the direct result of testimony before the Senate Committee by Joseph M. Dodge, of the Joint Price Adjustment Board. The Joint Price Adjustment Board was the top administrative agency charged with overseeing all renegotiation. Mr. Dodge was Chairman of the Board. Mr. Dodge testified on Monday, December 6, 1943, and his testimony is contained in the Committee Hearings (Committee on Finance) at pages 1074-5 ("Revenue Act of 1943, Hearings, before the Committee on Finance, U. S. Senate; 78th Cong., 1st Sess.," Government Printing Office). There he details his suggestions for changes in the Renegotiation Act. As we interpret Mr. Dodge's language he there makes the specific suggestion, in reference to the exemption, to this effect: that, although there were certain prime contracts which he felt undesirable to exempt from

the renegotiation, the subcontracts under those prime contracts should be exempt from an earlier date than the prime contracts themselves. The following is his suggestion:

> "F. Retroactive application of new exemptions and related provisions: It is suggested that the exemptions of *charitable contracts*—subsection (i) (1) (D), page 125, line 25—and of *subcontracts* under exempt prime contracts—subsection (i) (1) (E), page 126, line 3, and the provision for special cost allowance at the exemption line in the case of exempted products used by integrated companies—subsection (i) (3)—should be added to the list of provisions of the act which are made effective as though they had been made a part of section 403, on the date of its enactment, April 28, 1942. [See subsection (d) effective date, page 130, line 7.]"

It should especially be noted that the "subsection (i) (1) (E)" referred to by Mr. Dodge is the "(E)" section of the House bill and not the "(E")" section of the present law. The House bill "(E)" related to subcontracts only and became the "(F)" section of the present law. The Conference Report states:

> "*Amendment Numbered 295:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: 'On page 96, line 17, of the Senate Engrossed Amendments, strike out "(F)" and insert (E); and the Senate agree to the same.'"
>
> "*Amendment Numbered 296:*
>
> "That the House recede from its disagreement to the amendment of the Senate Numbered 296, and agree to the same with an amendment as follows: 'In lieu of the matter proposed to be inserted by the Senate amendment insert (F); and the Senate agree to the same.'"

The managers stated as follows:

"*Amendment Numbered 295:*

"This amendment exempts from the provisions of the Renegotiation Act any contract awarded as a result of competitive bidding for the construction of any building, structure, improvement, or facility. The House recedes with a clerical amendment, relettering the sub-paragraph."

"*Amendment Numbered 296:*

"This is a clerical amendment. The House recedes with a clerical amendment relettering the sub-paragraph."

Therefore, we submit that the contracts upon which suit has been brought are exempt from all renegotiation; and because the District Court did have jurisdiction to hear the matter, Appellants' Motion to Dismiss should have been granted.

III.

(Question Presented No. III This Brief Page 6)

With Respect to Appellants' Subcontracts and the Determination of the Secretary That Excessive Profits Were Derived Therefrom, the Renegotiation Act Is Unconstitutional.

(1) THE RENEGOTIATION ACT VIOLATES STANDARDS REQUIRED OF LEGISLATION UNDER THE CONSTITUTION OF THE UNITED STATES, FOR THE REASON THAT IT IS INDEFINITE AND UNCERTAIN IN THAT THERE IS NO LEGAL DEFINITION OF THE TERM "EXCESSIVE PROFITS."

In the enactment of April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528, 77th Cong., 2nd Sess.) sometimes called the First Act, no definition of "excessive profits" is set forth. This may be stated categorically. Renegotiation was permitted whenever in the "opinion" of the Secretary "excessive profits" had been realized. Specifically, Section 403(c) provided:

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized . . . to recover such amounts. . . ."

Neither advocacy, authority, nor argument can create a legal definition out of the foregoing, unless, of course, the mere "opinion" of an administrative official is of legal significance. Indisputably, the "opinion" of the Secretary lacks legal content. An opinion guided by definite rules and standards might be of legal significance but rules and standards to prescribe the Secretary's opinion are absent.

Then, in the amendment of October 21, 1942 [Section 403(a) (4)], confounding the issue further, "excessive profits" is defined as "excessive profits"! This statement is neither captious nor impertinent. Section 403(a) (4) provides:

"(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

"Renegotiation" in fact (Fourth Defense of Appellants, R. p. 13 and admitted by virtue of the Government's Motions for Judgment on the Pleadings and For Summary Judgment, R. p. 23) and in law (Section 403(a) (3), October 21, 1942 Act) amounts only to a refixing of the contract price by the Secretary.

It is clear, then, that up to and after the October 21, 1942 Amendment, there was no definition of "excessive profits"; "excessive profits" were profits which the Secretary, in his uncontrolled opinion, found to be excessive.

In the Act of February 25, 1944 [Revenue Act of 1943, Section 403(a) (4) (A)] certain factors were set forth which were to be taken into consideration in any determination of excessive profits. This was an attempt to put content into the term.

However, Section 403(a) (4) (A) is not applicable to fiscal years prior to July 1, 1943, and accordingly, it may not be presumed that these factors were used in the instant determination. The 1943 Act permits no doubt in this respect. The "Effective Date" provision of the 1943 Act provides:

> *"Section 701(d)—Effective Date*
> "The amendments made by subsection (b) *shall be effective only with respect to the fiscal years ending after June 30, 1943, except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment, and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

Section 403(a) (4) (A) is not among the Sections related back to April 28, 1942!

Therefore, the determination of the Under Secretary of War, upon which this action is brought, is and must be upon the definition of "excessive profits" contained in the enactments of April 28, 1942, and October 21, 1942, which define "excessive profits" as "excessive profits."

In any event, we submit that it is neither legally proper nor fair play for the Government to contend that 1943-44 legislation should govern 1942 business, but, as we have pointed out, this argument need not be made, because the Act of February 25, 1944 specifically exempted 1942 business in this respect.

The Government argues, however, that the factors and standards of the Act of February 25, 1944, were actually

ordinary administrative practice and Congress inferentially approved them for all business by inserting them in the 1944 Act. This argument is specious for the obvious reason that when Congress did adopt the factors and standards of Section 403(a) (4) (A) the Act of February 25, 1944, assuming them to be the same as the factors used administratively, it specifically stated that they were to apply to fiscal years subsequent to July 1, 1943, *only*. Therefore, not only did Congress not approve the practice for prior years, but left prior years to be governed by the Statute of April 28, 1942, and October 21, 1942 alone.

On the other hand, Appellants do not shun a discussion of the factors of the Act of February 25, 1944, contained in Section 403(a) (4) (A) thereof, for they better the situation very little even if applied to the 1942 business here involved. In the first instance, certain named factors may be taken into consideration; these may be of relevance. But *there is no exclusion of other factors* that may be considered, and the cardinal sin of this is plainly shown in the action of the Secretary here. In the order of October 20, 1944, Exhibit A to the Government's complaint (R. p. 3), the sinful scope of what was considered is indicated. Certain data submitted by the contractor and other information obtained by the Secretary from Governmental or "other reliable sources" (unknown to Appellants) were used as a basis of the determination. The best that can be said for this is that the use of facts and information unknown to Appellants is candidly admitted.

Further, factor vii itself states that such other factors, the consideration of which the public interest and fair and equitable dealings may require, may be considered. This opened the door for completely unrestrained and unfettered action by the Secretary, subject to his whims, and may indeed be changed from day to day or from hour to hour, and subject, too, to changes in opinion occasioned by

changes of personnel in the Secretary's staff. No greater vice is known to the law than evidence dehors the record, and secret data; *and here, the determination itself shows on its face that information unknown to Appellants and to this Court, was used.* This Court has, on many occasions, indicated its abhorrence of such illegal procedures.

Ohio Bell Telephone Co. v. *Public Utilities Comm. of Ohio*, 301 U. S. 292;
Morgan v. *United States*, 298 U. S. 468 and 304 U. S. 1.

In the *Ohio Bell* case the Court condemned procedures such as these in the following language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. *The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms.*"

And then, considering the factors separately, it will be noted that the emphasis in (i) is efficiency, (ii) reasonable-

ness of costs and profits, and in (iii) amount and source of capital, and in (iv) risk assumed, (v) extent of contribution to the war effort, and (vi) complexity of business, and (vii) such other factors as might come to the mind of the administrator. Who is to say what is efficiency? Who is to say what is a reasonable cost and a reasonable profit? For instance, does increased volume warrant greater or lesser profits; and if so, how much? What is the yardstick to be used? Does the peacetime product warrant a greater profit than the wartime product? Or supposing the contractor is still making the peacetime product, as is the case with appellants, is he entitled to one profit on his peacetime product, and still another profit on his wartime product? Who is to say that a manufacturer who uses private capital deserves a higher profit in dollars and percentages than a contractor who is working on public capital? And if so, how much? Who is to say what is the risk assumed in any business? Is it measured by volume of sales, net worth, or dollar amount of risk, or the Secretary's opinion? Who is to say as to the nature and extent of the contribution to the war effort? Does it mean that a plant or an organization that did not work the clock around was not making the proper contribution? What is inventive talent? Who is to determine the complexity of a manufacturing technique? And what credit can be given for this? A machine is tooled within 2/15000 of an inch; is this to be given greater credit than laying to the line by Appellants' masons? Who is to say what are the other factors, and the weight given to them, which the Secretary may consider from time to time, that will place a halo over the contractor's head or place the onus of profiteer on his name?

So, assuming that the factors of Section 403(4) (A) of the Second Act were taken into consideration by the Under Secretary of War in making his determination here (although this may not properly be assumed because the Act

of February 25, 1944, specifically states that Section 403(a)(4)(A) does not apply to 1942 fiscal years), there still is no definition of "excessive profits" which is not vague, indefinite and uncertain and which prescribes the Secretary's action within proper limits.

The definition of the term "excessive profits" is the keystone of the arch on which the statute rests. If there is no definition which is definite and certain, as there is not, it follows that the statute itself must fall. Vagueness, uncertain terms and indefiniteness are legislative sins which the courts do not condone but correct by striking down the legislation.

> *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81;
> *Weeds* v. *United States*, 255 U. S. 109;
> *Small Co.* v. *American Sugar Co.*, 267 U. S. 233;
> *Schechter Poultry Co.* v. *United States*, 295 U. S. 495;
> *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

(2) THE LEGISLATIVE FUNCTION RESIDING IN THE CONGRESS OF THE UNITED STATES IS IMPROPERLY DELEGATED IN THE RENEGOTIATION ACT.

The essentials of a proper delegation of legislative authority has been variably expressed. In the *Yakus* case (321 U. S. 414) the Court said (pp. 424-5):

> ". . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by designated administrative agency, it directs that its statutory command shall be effective. . . ."

In the *Schechter* case (205 U. S. 495, 541) the Court said:

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. . . ."

In *Panama Refining Co.* v. *Ryan* (293 U. S. 388, 415) the Court said:

> ". . . Accordingly, we look to the statute to see whether the Congress has declared a policy . . . whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President. . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition."

A careful examination of all these cases compels the conclusion that in determining whether or not any particular legislative act is bottomed upon Constitutional legislative standards and is confined within Constitutional boundaries to assure predictable administrative action that is not vague, not unreasonable, not inefficient, not unpredictable, etc., three basic conditions must exist:

(a) The Act must contain a definite statement of policy or purpose.

(b) Congress itself must prescribe definite standards for the administrative guidance.

(c) The Act must prescribe methods to be followed in its administration, by which not only Congress but the courts and the public can determine whether the agency has kept within the limits so prescribed by Congress.

The question then is, do these basic conditions exist with respect to the Renegotiation Act? We submit that none of these basic conditions does exist.

(a) *As to Whether There Is a Definite Statement of Policy or Purpose.*

One will search the Acts in vain for a statement of policy or purpose. The Acts refer to excessive profits. Indeed there may be evils flowing from them. But the Act does not contain a statement of policy or purpose to give body

and content to the term, nor to guide the administrator. Little more need be said in this respect. If, in fact and law, there must exist a statement of policy or purpose, as we contend, it does not exist in the Renegotiation Act.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

(b) *As to Whether Congress Has Prescribed Definite Standards for Administrative Guidance.*

We have urged (pages 25 to 31 hereof) that Congress has not prescribed definite standards for administrative guidance, viz: that Congress has not provided a definition of excessive profits. That statement will not be repeated here, except to recapitulate, that what the Court is here concerned with is the Act of April 28, 1942, and the Act of October 21, 1942. The so-called factors or standards of the Act of February 25, 1944, are not pertinent. Accordingly legislative debates with respect to the 1942 enactments are relevant here.

It is noteworthy that legislative discussions, both on the floor of Congress and in committee hearings, *show a lack of any legislative opinion that efficient and reasonable standards to insure predictable administrative action are contained in the 1942 Acts.* Illustrative of this are the following quotations from the "Legislative Materials compiled for the use of the Committee on Ways and Means of the House of Representatives by Barron K. Grier, Clerk" with Congressional Record paging supplied:

Page 27—Senator Taft: 88 Cong. Rec. 3485

"... and the bill leaves the whole matter in the arbitrary and individual discretion of the Secretaries, without any rule whatever to determine, in the case of each contract, whether a particular contractor has or has not obtained an excessive profit."

Page 89—Representative Cannon: 88 Cong. Rec. 3697

"It leaves it for him alone (the Secretary) to deter-

mine what is fair and reasonable profit and the formula by which he may elect to reach that determination."

Page 92—Mr. Vincent: 88 Cong. Rec. 3698

". . . . It (the 1942 Act) was unacceptable in that it delegated to the various department heads the absolute and unlimited authority to determine what constituted excessive profits, without providing any standards for the insurance of the contractor and the guidance of the department head."

Page 95—Mr. O'Connor: 88 Cong. Rec. 3708

"Now the amendment that has been written into the Bill does anything but this (taking profits out of war). It gives the power to three different departments to fix what is excessive profits. There is no standard provided in the language whereby excessive profits may be determined. What one person may think is excess profits may appear to another to be reasonable. In other words, we are delegating power vested in the Congress of the United States by the Constitution to three different departments to carry out. This is not the proper thing for this Congress to do. . . ."

Page 117—Senator Shipstead and Senator McKellar: 88 Cong. Rec. 3766

Mr. Shipstead: "Then as I understand, decision as to the question of excess profits is left entirely to the conscience of the Secretary. Is that correct?"

Mr. McKellar: "The conscience of the Secretary of War, the Secretary of Navy, or the Chairman of the Maritime Commission."

Mr. Shipstead: "Is it not a fact that the fixing of excessive profits will be done according to the consciences of the various Secretaries?"

Mr. McKellar: "Yes, sir; that is correct."

Page 121—Senator Pepper and Senator McKellar: 88 Cong. Rec. 3767

Mr. Pepper: "Is there anything in the record of either debate in the Senate as the Senator recalls it or in the

discussion of the conferees that indicates anything in the nature of a standard or a principle which might guide the Secretaries in the administration of this proposed law?"
Mr. McKellar: "No, sir."

Page 127—Senator Walsh and Senator Overton: 88 Cong. Rec. 3770
Mr. Walsh: "Let me put it this way: Does the Senator know of any existing law which attempts to determine profit limitations, so that the public and the administrative officials may know what is the line of demarcation between legitimate profits and excess profits?"
Mr. Overton: "There is no law providing any yardstick in that connection."

Page 137—Senator Taft: 88 Cong. Rec. 3774
"It has been admitted that there is no definition in the bill of what constitutes excess profits. . . .
". . . Here is a provision dealing with literally billions of dollars, which is to be operative for years to come, and we cannot on the floor of the Senate agree what it means. . . .
"Whether the provision means granting to the Secretaries arbitrary power, or whether it means nothing, is a subject upon which members of the committee themselves cannot agree. The Senator from Louisiana (Mr. Overton) feels that nothing can be done unless a contract is renegotiated and a new agreement reached with the consent of the contractor. . . .
". . . I agree that the provision is ambiguous. I agree that there are all sorts of possible interpretations. . . .
". . . Any contract might be voided by the Secretary tomorrow, at his discretion. I think that is clear.
". . . There is not the faintest suggestion of a yardstick for excessive profits."

Page 148—Senator Walsh and Senator McKellar: 88 Cong. Rec. 3308. (Referring to Section 403 of the October 21st Amendment)

Mr. Walsh: ". . . Nothing like it had ever before been proposed in a legislative way. It gave the Government the right to amend an obligation which it had agreed upon with a contractor and insist upon the right to renegotiate that contract."

Mr. McKellar: "There is a condition attached—that whenever in the opinion of the Secretary of War, or the Secretary of the Navy, or the Chairman of the Maritime Commission they should find that the prices stated in a contract were excessive."

Mr. Walsh: "That is correct, but it practically gave them unlimited power. . . .

"There were no yardsticks and very few limitations in the extraordinary power granted."

The foregoing quotations may be easily multiplied. It is of striking significance that no Senator or Congressman ever unequivocally voiced the opinion that legislative standards to insure predictable administrative action were present in the Renegotiation Act except Senator McKellar (Legislative Materials, p. 250, 89 Cong. Rec. 6172), and Representative Patman (p. 226, 89 Cong. Rec. 4621). Both had previously stated otherwise (supra).

Upon the foregoing it would appear that it should be assumed that Congress knowingly and deliberately passed legislation lacking in Constitutional requirements; either this, or that some other impulse was present which overrode consideration of the patent unconstitutionality. The record discloses that the patent unconstitutionality, although apparent and realized, was discounted because Congress was of the impression that, in all cases, renegotiation was to be contractually agreed upon between contractors and subcontractors on the one hand and the Government on the other hand. Representative Disney stated (Congressional Record, Vol. 90, p. 10250) that:

". . . Under the amendments recommended by the Committee (referring to the Tax Court) these stand-

> ards do not have to be applied judicially, since the obligation to refund excessive profits is made in all cases a contractual obligation of the contractor. . . ."

So, for instance, Senator Hayden (Legislative Materials, p. 131) said (88 Cong. Rec. 3771):

> "I entirely agree with the Senator (Overton) that, from the legal standpoint, no contract can be renegotiated except as the result of an agreement between the contractor and the Government. . . ."

We have therefore an anomalous situation: Congress passed a statute which in its opinion was unconstitutional if statutorily applied, but the passage of the Act was agreed to because it was of the opinion that renegotiations under its provisions were always to be mutually agreed upon.

Whether renegotiation was to be mutually agreed upon or not may be determined only by the Act. This much is clear; it has not been applied as a matter of agreement; it has been statutorily applied in this cause. This is shown not only by the order itself set forth in the Bill of Complaint (R. p. 1) but is admitted by the Government's Motions for Judgment on the Pleadings and For Summary Judgment by virtue of the Appellants' Fourth Defense (R. p. 13) which sets forth that no "negotiation" took place. The consideration of this defense was foreclosed by the District Court (R. p. 29) on the grounds that it was irrelevant in view of the fact that Appellants did not go to the Tax Court. The point is, however, that the "renegotiation" was not a matter of agreement; and the iniquities of the Acts, clearly seen by Congress in its debates, were fully operative to Appellants' prejudice.

In conclusion, therefore, the Act itself and the legislative materials, show that Congress did not prescribe standards for administrative guidance which permit a legal determination of excessive profits.

(c) *As to Whether the Act Prescribes Methods to Be Followed in Its Administration by Which Not Only Congress but the Courts and the Public Can Determine Whether the Agency Has Kept within the Limits Prescribed by Congress.*

Neither in the 1942 Acts, nor in the Act of February 25, 1944, are there any methods or procedures set forth, which will assure, upon later examination, that action taken thereunder is within the limits prescribed by Congress.

Of course the limits themselves are impossible to ascertain, as the definition of the very basis of the statute, i. e., "excessive profits" is vague and indefinite (see pages 25 to 31 hereof). So even if proper methods and procedures were set forth, they avail nothing if the limits and boundaries upon use of the methods are not stated. Accordingly, for purposes of argument here, one must assume, contrary to the fact of it, we submit, that the ultimate limit, i. e., the definition of excessive profits, of the Acts are properly defined. So, assuming this, what are methods and procedures which will enable Congress, the courts and the public to determine whether the Secretary has kept within the limits prescribed by Congress? We submit that any legislation, under examination in this respect, must provide that the Administrator conform to two requirements, without which the methods and procedures are legally insufficient.

Firstly, the legislation must afford a fair hearing. *Secondly*, the legislation must require that the Secretary base his determination upon an adequate finding which must be spread upon the record of the proceedings.

Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182;
Morgan v. *United States*, 304 U. S. 1, 14, 15;
Ohio Bell Telephone Co. v. *Public Utilities Co.*, 301 U. S. 292, 300;
Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 202;

Panama Refining Co. v. *Ryan*, 293 U.S. 388, 431;
Saginaw Broadcasting Co. v. *Federal Communications Commission*, 96 F. (2d) 554, 559.

The First Act, under which this action is brought (page 12-13 hereof) is barren of any requirements for a hearing. The Act of February 25, 1944, provides for a hearing in the Tax Court, but the Tax Court hearing, upon a determination of the Secretary, is optional for 1942 business (pages 7 to 17 hereof). It follows, therefore, that under the First Act, an adequate hearing would be required at the administrative level of the *Secretary*, but there is no provision requiring it.

The Secretary here purported to grant a hearing (R. p. 5) in advance of making a determination. The implication is that he thought it was necessary, but it is admitted that there was none by virtue of Appellants' Fourth Defense (R. pp. 14-45) and the Government's Motion For Judgment on the Pleadings and For Summary Judgment (R. p. 23). This hearing, however, whether actual or purported, was of no effect, because the determination was in part based upon information secured "from Governmental or other reliable sources" (R. pp. 4-5). Accordingly, there was no hearing in fact.

Likewise, neither of the Acts require adequate findings; and the determination itself (R. p. 3 et seq.) may not serve as such as it is only the ultimate conclusion of the Secretary.

So, inasmuch as the Act itself makes no provision for a hearing or for findings, and inasmuch as there has been no hearing or findings in fact, it follows that the Acts and the determination are unconstitutional, because they do not provide for methods and procedures which will permit Congress, the courts and the public to ascertain whether the Secretary has done his job properly.

(3) THE DETERMINATION THAT APPELLANTS REALIZED EXCESSIVE PROFITS, AND THE JUDGMENT BASED THEREON, CONSTITUTE A TAKING OF APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW, AND A TAKING OF APPELLANTS' PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

The issue here is whether the determination of the Secretary, ordering Appellants to pay over money in their possession into the United States Treasury, is a taking of property for public use without compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. The Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use without just compensation."

It is elementary that if there has been a "taking" of private property, just compensation must be made; and that the fixing of the compensation for the taking must be by judicial processes. This is axiomatic, unless, of course, the Constitution is suspended in time of war—which it is not—or unless the Renegotiation Acts operate validly as a taxing measure. The Government contends that the Renegotiation Act is in no sense a taxing measure.

Appellants submit that their property has been taken; that the taking has been wholly without compensation; and that the administrative determination effecting the taking not only has been without judicial process, but if the Government's contentions are correct, Appellants do not have even the ultimate right to a judicial determination upon the administrative action.

(a) *There Has Been a Taking of Appellants' Property.*

The sequence of legally effectual events in the instant case is as follows: (i) Appellants secured certain contracts after competitive bidding (R. p. 4); (ii) Appellants entered

upon the performance of those contracts (R. p. 4); (iii) The Sixth Supplemental National Defense Appropriation Act of April 21, 1942, was passed;* (iv) Appellants received payment upon their contracts; and (v) the Secretary made a determination that Appellants should pay unto the United States Treasurer a certain portion of the proceeds of the contracts received by Appellants.

The proceeds derived from a contract are the property of the contractor. To take, to retake or to "recapture" part of the proceeds amount to one and the same thing: it results in the removing to the possession of the Government something which was previously owned by and in the possession of Appellants. To term this not a "taking" but a "recapture" is a mere play on words. To term the process of removing it from Appellants' possession to the Government's possession as renegotiation, is only a device; it does not change the circumstances of the transaction—that the Government has reached out and taken and appropriated property of Appellants.

To be sure, this may be done in the valid exercise of the taxing power. The Government, however, has always stoutly and vigorously opposed the view that the Renegotiation Act was taxing legislation, as the constitutional infirmities of the legislation are so clear if the Act is so viewed. There is not the uniformity required of tax legislation. In the words of Mr. Patterson, the Under Secretary of War, who made the within determination, it "could not stand" as a taxing measure (Hearings Before House Ways & Means Committee; 78th Cong., 1st Sess. 9/23/43, pp. 848-51) because "there is no doubt about that, it is too broad and too general."

On many considerations the Renegotiation Act does appear to be a taxing revenue measure. A series of conjoin-

* Not all, but the bulk of Appellants' subcontracts, in dollar volume, were dated prior to April 28, 1942.

ing circumstances demonstrates this: (1) Its legislative form has always been in the revenue acts; (2) Only a brief and cursory glance at legislative materials show that in the minds of the legislators they were taxing profits arising out of war business; (3) The ultimate in the administrative side is the Tax Court and, of course (4) The ultimate result of the Renegotiation Act is removing moneys from the pockets of the citizens to the public treasury.

We do not deny that Congress has the power to regulate by a taxing measure, nor do we deny that Congress may not aid the procurement process by a regulatory measure. But if the Renegotiation Act is a taxing measure, it is clearly and abundantly invalid as such. If, on the other hand, it is simply another means of taking property from the citizen unto the Government, no matter what the terminology is, then it must conform to the minimal requirements of due process and the assessment of just compensation. Appellants submit that the force and effect of the Renegotiation Acts is that of a taxing measure; that it is more of a taxing measure than anything else known to the law. If we are correct in this, the Acts are invalid. This, albeit, is one of the reasons why, constitutionally, the policy of the Act must be stated by Congress. Then we would know what it is. But if we are not correct that it is a taxing measure, then certainly there has been a taking of Appellants' property, and the requirements for securing the citizen against a taking must be looked into. This follows.

(b) *No Compensation Has Been Paid upon the Taking of Appellants' Property.*

Valid contracts are property protected by the Fifth Amendment.

Lynch v. *United States*, 292 U. S. 571, 579;
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106, 123.

A fortiori, the proceeds received or to be received for performance of such a contract belong to the contractor and are likewise property protected by the Fifth Amendment. Appellants here were the owners of the proceeds of certain contracts. These proceeds were received. The Secretary however determined that part of these proceeds should be paid into the public treasury. Is it not obvious that if this is done it will result in Appellants having something less than the proceeds for which they contracted; that is, something less than their property in this contract? If this "something else" ends up in the public treasury, what is the compensation that has been paid for it?

With apprehension that counsel might be accused of over-simplification, it does seem that theories revolving around the point that just compensation is paid if the property owner is allowed reasonable profits, or fair profits, etc., etc., are actually quite beside the point. The issue must be squarely faced. The contracts owned by Appellants, and their proceeds, constitute an integrated "bundle of sticks" as much as a piece of real estate. The Renegotiation Act does not regulate nor control the sticks. It simply says that Appellants must deliver some of the sticks to the Government. If, when the property owner delivers some of his sticks to the Government, the equivalent in value is not paid to him—which it is not—we submit that no compensation has been paid for the taking of his property.

(c). *In Relegating the Appropriation Powers to the Secretary of War There Has Been an Unlawful Encroachment upon the Judicial Power.*

The ascertainment of just compensation is a judicial function.

Monongahela Navigation Co. v. *United States*, 148 U. S. 312, 327;

Seaboard Airline R. Co. v. *United States*, 261 U. S. 299, 304;
United States v. *New River Collieries*, 262 U. S. 341, 343.

Even more pertinent is the language in *National City Bank* v. *United States*, 275 Fed. 855, 859; affirmed at 281 Fed. 754; error dismissed, 263 U. S. 726, when it was stated:

> "The executive officers of the Government have no power to fix compensation, nor can the Congress determine by statute what is just compensation. The question is judicial and can be determined only by the courts."

Appellants are entitled to a judicial determination, as required under the Fifth Amendment.

Assuming, for the purposes of argument here, that Appellants are too sanguine and the question of the taking is not as simple as herein stated, still Appellants are entitled to a judicial determination of this. And, as urged in Point 1 hereinabove, Appellants' view of the statute involved actually allows to them a hearing in the District Court for the purpose of making the determination of the compensation to which they were entitled from their contracts. Furthermore, under the Renegotiation Act of February 25, 1944, even though not applicable here, the judicial process is never available to any contractor for the reason that the Renegotiation Act of February 25, 1944, provides in the Tax Court sections [Sec. 403(c) (1) and 403(e) (1)] "that the proceedings of the Tax Court shall be final and conclusive" and "shall not be reviewed or determined by any court or agency."

Accordingly, we submit that here there is attempted taking of Appellants' property; that compensation is not to be paid; and, lastly, that the fixing of that compensation has not been by judicial process. These infirmities render the Act unconstitutional as applied to Appellants' contracts.

Finally, is the Constitution suspended in time of war? We submit that it is not.

War legislation transcending constitutional boundaries in the First World War was stricken down. In *United States* v. *Cohen Grocery Company*, 255 U.S. 81, 88, the Court said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Perhaps a more pertinent explanation is contained in *United States* v. *Schechter Poultry Co.*, 295 U. S. 495, 528. In this case it was urged that the national crisis demanded a broad and extensive cooperative effort by those engaged in trade and industry, and in the event cooperative effort as seen from the executive viewpoint was not forthcoming coercive exercise of Government power was called for. The Court said (p. 528):

> ". . . we are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* The Constitution established a national government with powers deemed to be adequate, as they had proved to be both in war and peace, but these powers of the national

> government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. . . ."

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 425, the doctrine is again stated:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

Historically, these cases are bottomed upon firm judicial precedent, for, in *Ex Parte Milligan*, 4 Wall. 2, 120, the Court said:

> ". . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

The foregoing is not to deny that the war power of the Government is the power to wage war successfully. It is not

restricted to the repulse of the enemy forces in the field. To wage war successfully every phase of the national life must be encompassed. It is not to say, either, that the Government should not insist that the forces of trade and industry be in full production for the benefit of the war effort. What the power to wage war successfully does not approve, however, is indiscriminate, arbitrary and capricious taking of property for public use, with insufficient standards to guide the administrative personnel, and without the uniformity, geographically or otherwise, to sustain the legislative act as a taxing measure. It should also be abundantly clear that neither the morale of the troops nor that of the Nation would have been adversely affected if the statute had been framed so that it would operate surely and uniformly and without discrimination as between persons similarly situated.

AD HOMINEM

Finally, no excess profits are contained in Appellants' contracts. This was found "beyond a reasonable doubt," we submit, by the courts below. Appellants' contracts were each and all for brick masonry, similar to brick masonry as known in the construction industry for many years (Findings of Fact No. 2, R. p. 26). The costs, percentages of profit and contract prices of such contracts are ascertained, calculated and realized in a manner generally known to all Departments of Government and to the construction industry for many years, and the contracts were entered into upon competitive bidding on the part of the principal contractors, and further competitive bidding on the part of defendants and other masonry subcontractors (Statement of Fact No. 2, R. p. 26). Hence the prices of the contracts as let were the fair and reasonable market prices because they were determined in the manner in which time and experience have shown to be the best means for determining such prices.

Appellants' contract, therefore, could not and did not contain excessive profits.

Respectfully submitted,

PAUL W. STEER,
STEER, STRAUSS & ADAIR,
2215 Union Central Building,
Cincinnati 2, Ohio,
Attorneys for Appellants.

Of Counsel:
STEER, STRAUSS & ADAIR,
2215 Union Central Building,
Cincinnati 2, Ohio.

Dated: September 20, 1947.